

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Eliana Behar	Team: Squad #1	CCRB Case #: 202007709	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 10/29/2020 9:00 PM	Location of Incident: Outdoor lot located at 2140 8th Avenue	Precinct: 28	18 Mo. SOL 4/29/2022	EO SOL 5/4/2022	
Date/Time CV Reported Sat, 11/07/2020 5:00 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 11/23/2020 11:15 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POF Nicole Roark	18530	964243	028 PCT
2. Officers			028 PCT
3. LT Mervin Bennett	00000	920019	028 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. SGT Alex Chen	05043	954635	028 PCT
2. POM Ronald Kennedy	15682	964087	028 PCT
3. POM Matthew Grieve	20150	958653	028 PCT
4. POM Dominic Bracco	26634	966968	028 PCT
5. CPT Edison Gutierrez	00000	932763	028 PCT
6. POM Thomas Ye	05861	965629	028 PCT
7. POM Joel Torres	26169	965571	028 PCT
8. POM Rodney Tomek	04457	937640	028 PCT
9. POM David Galindez	18334	958611	028 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POF Nicole Roark	Abuse: Police Officer Nicole Roark entered 2140 8th Avenue in Manhattan.	
B. Officers	Abuse: Officers interfered with § 87(2)(b) use of a recording device.	
C.POF Nicole Roark	Abuse: Police Officer Nicole Roark damaged § 87(2)(b) s property.	
D.POF Nicole Roark	Abuse: Police Officer Nicole Roark entered the storage container inside 2140 8th Avenue in Manhattan.	
E.POF Nicole Roark	Abuse: Police Officer Nicole Roark searched the storage container inside of 2140 8th Avenue in Manhattan.	
F.LT Mervin Bennett	Abuse: Lieutenant Mervin Bennett seized § 87(2)(b) s property.	

## Case Summary

On November 7, 2020 § 87(2)(b) filed the following complaint with IAB regarding an incident that took place on October 29, 2020. The CCRB received this case on November 23, 2020.

On October 29, 2020 § 87(2)(b) responded to the parking lot located at 2140 8<sup>th</sup> Avenue in Manhattan and spoke to Police Officer Nicole Roark and other officers from the 28<sup>th</sup> Precinct who told him that they received notice that illegal All-Terrain Vehicles (ATVs) were inside of the parking lot and therefore were going to remove those items. The property manager, § 87(2)(b) unlocked the gate to the lot and based on permission obtained by PO Roark she and other officers entered the lot (**Allegation A: Abuse of Authority**—§ 87(2)(g) § 87(2)(b) remained outside the gated entrance holding his cellphone and filming the officers. Officers pointed their flashlights directly at § 87(2)(b) cellphone, preventing him from filming them (**Allegation B: Abuse of Authority**—§ 87(2)(g) § 87(2)(b)).

Inside of the lot, officers, based on information obtained by PO Roark, broke the lock on § 87(2)(b) storage container (**Allegation C: Abuse of Authority**—§ 87(2)(g) § 87(2)(b). Based on the information obtained by PO Roark, officers entered and searched the container, and under the supervision of Lt. Mervin Bennett, they then removed § 87(2)(b) ATVs (**Allegations D, E, and F: Abuse of Authority**—§ 87(2)(g) § 87(2)(b)).

The investigation obtained BWC footage of this incident from seven officers. There are 12 BWC videos from this incident (Board Review 01-12).

## Findings and Recommendations

### Allegation (A) Abuse of Authority: Police Officer Nicole Roark entered 2140 8<sup>th</sup> Avenue in Manhattan.

It is undisputed that PO Roark responded to the outdoor storage lot located at 2140 8<sup>th</sup> Avenue after receiving information that illegal ATVs were stored on this lot (Board Review 21). It is also undisputed that she called the owner of the lot, § 87(2)(b) and received permission to go onto the property and remove these items from the lot.

§ 87(2)(b) stored ATVs and bicycles in a locked storage container on the above property, which he rented from a third-party. § 87(2)(b) stated that he provided his own locks for his storage container (Board Review 12). § 87(2)(b) received a call from the property manager, § 87(2)(b) who told him that NYPD officers were at the lot and going to remove items from his storage container and he immediately responded to the location. § 87(2)(b) stated that the ATVs belong to his friend, § 87(2)(b) and that § 87(2)(b) has paperwork proving that he owns the ATVs. When § 87(2)(b) arrived at the lot PO Roark explained to him that the NYPD received a complaint that people were riding ATVs from this lot around the neighborhood and that they needed to remove the ATVs. § 87(2)(b) watched additional officers arrive on scene and saw § 87(2)(b) unlock the gate to the lot for the officers. § 87(2)(b) asked the officers if he could go into the lot with them and they told him that he must wait outside of the gate (Board Review 13).

In PO Roark's BWC (1 of 3), at the 00:30 mark, she calls the property owner, § 87(2)(b) and their conversation is on speaker phone. PO Roark asks him for permission to enter the storage lot and go on his property to find the ATVs. At 00:37 of the BWC video, § 87(2)(b) provides PO Roark with permission to enter his property and tells her that ATVs are not allowed to be on his lot. PO Roark then asks § 87(2)(b) if she can break the lock on the lot to enter, and he tells her to

wait for § 87(2)(b) who will be there shortly with the keys to unlock the lot (Board Review 01). PO Roark testified that when she arrived at the lot, she called § 87(2)(b) and informed him that a lady from the community reported to her that there were ATVs on § 87(2)(b)'s lot and provided her with photographs of people illegally riding these ATVs in the streets. § 87(2)(b) told PO Roark that ATVs are not supposed to be stored on his lot and that the only person who has access to his lot is his property manager, § 87(2)(b) provided PO Roark with verbal permission to enter the lot with § 87(2)(b) and remove the ATVs from his lot. § 87(2)(b) arrived on scene and unlocked the gate to the lot for PO Roark (Board Review 16).

According to Payton v. New York, 355 U.S. 573 (1980) officers may enter a premise when consent is given (Board Review 14).

§ 87(2)(b), § 87(2)(g)

**Allegation (B) Abuse of Authority: Officers interfered with § 87(2)(b) use of a recording device.**

When officers entered the lot, § 87(2)(b) remained outside of the gate to the lot and took out his cellphone and filmed the officers from outside of the gate. § 87(2)(b) stated that the officers saw him filming them and pointed their flashlights at § 87(2)(b)'s cellphone, preventing him from filming them. § 87(2)(b) mentioned that he had the video footage of this incident, however he did not provide the footage to the CCRB. § 87(2)(b) also did not mention that he was with anyone else when he came to the lot (Board Review 12).

There is no BWC that captures § 87(2)(b) recording officers or officers shining their flashlight at § 87(2)(b) camera.

PO Roark stated that around five civilians arrived on scene while the officers were at the lot and claimed that they were the owners of the ATVs, however they were unable to provide any proof of ownership. PO Roark mentioned that the civilians were recording the officers on their cellphones and attempted to follow PO Roark and the other officers into the private lot. PO Roark told the people filming that they could not record on private property and that they could only record from outside of the lot. At no point did PO Roark take her flashlight and shine it at any person's cellphone camera to prevent them from recording, nor did she see any other officer do this (Board Review 16).

According to Patrol Guide Procedure 203-29 an individual has the right to lawfully record police activity in public places such as streets, sidewalks, parks, and private property in which the individual has a legal right to be present (Board Review 15).

§ 87(2)(b), § 87(2)(g)

**Allegation (C) Abuse of Authority: Police Officer Nicole Roark damaged § 87(2)(b) property.**

**Allegation (D) Abuse of Authority: Police Officer Nicole Roark entered the storage container inside 2140 8th Avenue in Manhattan.**

**Allegation (E) Abuse of Authority: Police Officer Nicole Roark searched the storage container inside of 2140 8th Avenue in Manhattan.**

**Allegation (F) Abuse of Authority: Lieutenant Mervin Bennett seized § 87(2)(b) property.**

It is undisputed that police officers entered § 87(2)(b) storage container and removed the ATVs from the container. Lieutenant Bennett was the highest-ranking officer on scene.

§ 87(2)(b) stated that his storage container had three locks attached. While he was waiting outside the lot, § 87(2)(b) approached him and told him that the police officers cut one of the locks attached to his storage container. § 87(2)(b) then entered the lot and unlocked the second lock with his key and the officers had the third lock cut as well. § 87(2)(b) remained at the storage lot all night until the next morning. On October 30, 2020, a trailer came and removed five of § 87(2)(b) ATVs from the lot. The ATVs were brought back to the 28<sup>th</sup> Precinct where they were vouchered (Board Review 13). § 87(2)(b) was unresponsive to follow up phone calls and the investigation was therefore not able to get documentation from him such as a lease agreement or paperwork proving ownership of the ATVs.

The investigation was unable to reach § 87(2)(b) the owner of the lot, and § 87(2)(b) was uncooperative when trying to contact him to find out if there was a lease agreement between § 87(2)(b) and § 87(2)(b). § 87(2)(b) did, however, state that § 87(2)(b) asked the officers if he could go inside the lot with them, and an officer asked him if he was the owner of the items inside the container, to which he responded “yes.” When asked if he owned the container which was holding his items, § 87(2)(b) told the officers that he did not own the container. § 87(2)(b) stated that that there were two locks on the container, and that § 87(2)(b) gave § 87(2)(b) the key to the second lock on the container. An officer broke the first lock on the container, and § 87(2)(b) unlocked the second lock to the container (Board Review 24).

In PO Roark’s BWC (2 of 3) she calls § 87(2)(b) and asks him if officers could clip the lock on the storage container to gain entry and he says that that is fine (Board Review 02). In PO Roark’s BWC (3 of 3) she is standing with § 87(2)(b). At the 01:15 mark of the BWC § 87(2)(b) states that he does not have the keys to unlock the storage container, and that the property owner gave him permission to tell NYPD officers that they could break the locks to access what was inside of the container (Board Review 03).

Sgt. Alex Chen’s BWC begins with him standing outside of the storage container with other officers. It is dark outside, and PO Ronald Kennedy and PO Matthew Grive are holding flashlights and shining them at the storage container. PO Kennedy and PO Grieve are standing closest to the container and appear to be trying to open the container by pulling the handles. At the 00:24 mark of the video they successfully open the doors to the container and go inside of the container where they shine their flashlights and illuminate several bicycles. At the 00:57 mark PO Roark says that they can seize all the ATVs from the container. At no point does any officer clip any locks on the storage container, nor are there any visible locks attached to the container (Board Review 05). The other officers’ BWC videos also capture officers opening the doors, entering, and searching the container, however there is no footage that captures any officer unlocking or breaking any locks attached to the container (Board Review 04, 06).

PO Roark stated that the ATVs were inside of a locked storage container located in the lot. PO Roark asked § 87(2)(b) for permission to go into the lot and remove the ATVs from the container. § 87(2)(b) provided PO Roark with permission to break any locks on the storage container if they needed. § 87(2)(b) let the officers inside the lot, had the key to the storage container, and unlocked the storage container that was holding the ATVs, that was the only storage container inside of the lot at this time. PO Roark mentioned that no locks were broken. Once PO Roark got inside of the storage unit, she discovered five ATVs. The ATVs were removed from the lot, vouchered, and brought to the 28<sup>th</sup> Precinct property room. PO Roark stated that when she was on scene none of the property was damaged, nor was she aware of any property damage occurring (Board Review 16).

Lt. Bennet testified that when he arrived on scene he spoke to § 87(2)(b) and asked him if the individual who was storing the ATVs on the lot had permission to store ATVs on the lot, and § 87(2)(b) told him that the individual did not have permission to store ATVs on the lot. Lt. Bennett also spoke to § 87(2)(b) attorney, who was on scene, and informed him that it was illegal to have ATVs in New York City and that the storage lot was private property, so his officers were going to remove the ATVs from the lot and bring them back to the precinct for investigation. Lt. Bennett went inside of the lot to see the ATVs and told the officers on scene to safeguard the ATVs until the truck came to remove them from the property. Lt. Bennett could not recall if any officers had to break locks to gain access to the storage container. Lt. Bennett did not remain on scene while the property was removed (Board Review 17).

According to *People v. Kelly* 872 N.Y.S. 2d 499 (2009), “the police may lawfully conduct a warrantless search when they have obtained the voluntary consent of a party who possesses the requisite degree of authority and control over the premises or personal property in question (Board Review 22).

According to NY Vehicle and Traffic Law Article 48C section 2403, ATVs are not permitted on any public land unless the land has been designated and posted for travel by ATVs (Board Review 23).

Although § 87(2)(b) testified that the officers broke two of the locks to his storage container, he did not observe them do so and also stated that he entered the lot and unlocked one of the locks for them, a fact that no one else corroborated. § 87(2)(b) did not provide any photographs or other evidence of damage to his locks. PO Roark stated that § 87(2)(b) unlocked the storage container so that they could gain access to the ATVs, a fact that § 87(2)(b) partially corroborated in that he stated that the police broke one lock, and he unlocked the other. The BWC captured the officers opening the doors to the storage container and entering the container but did not show any locks on the storage container. Based on PO Roark’s permission from § 87(2)(b) to break locks and § 87(2)(b)’s corroboration that one lock was broke, the investigation determined by a preponderance of evidence that officers broke at least one lock. Though the BWC does not capture any officer breaking a lock, the authority to do so was obtained via PO Roark.

Similar to breaking the lock, PO Roark and other officers entered and searched the storage container, as shown on BWC, based on the authorization from § 87(2)(b). However, the investigation was unable to obtain a lease agreement between § 87(2)(b) and § 87(2)(b) and it is therefore unclear who the true owner of, or had the authority to provide access to, the storage container. § 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

§ 87(2)(g)

**Civilian and Officer CCRB Histories**

- § 87(2)(b)  
[Redacted]  
[Redacted]  
[Redacted]
- Police Officer Nicole Roark has been a member of service for four years and has been a subject in one CCRB complaint containing two allegations which is still open.

**Mediation, Civil, and Criminal Histories**

- This complaint was not suitable for mediation.
- As of August 23, 2021, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards this to complaint (Board Review 17).
- According to the Office of Court Administration (OCA), § 87(2)(b) has no history of convictions in New York City (Board Review 18).

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Squad: 1

Investigator:	<u>Eliana Behar</u>	<u>Inv. Behar</u>	<u>12/14/21</u>
	Signature	Print Title & Name	Date

Squad Leader:	<u>Mgr. Joy Almeyda</u>	<u></u>	<u>12.15.21</u>
	Signature	Print Title & Name	Date

Reviewer:	<u></u>	<u></u>	<u></u>
	Signature	Print Title & Name	Date